(3)

Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

No. 02-754

In the Supreme Court of the United States

KATHERINE GRIFFIS,

Petitioner,

v.

MARIANNE LUBAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY OF PETITIONER

PROF. PETER ERLINDER
Counsel of Record
c/o William Mitchell College of Law
875 Summit Avenue
Saint Paul, MN 55105
(651) 290-6384

RALPH J. OVERHOLT
Attorney at Law
7400 Lyndale Avenue, Suite 180
Minneapolis, MN 55423
(612) 869-8829

Counsel for Petitioner: Katherine Griffis

2003 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY ARGUMENT 1

1. Counsel for Respondent's argument, regarding the ability of sister states to enforce each other's judgments for injunctive relief, confirms the compelling importance of the Petition for Certiorari filed in this matter. 1

   A. Injunctive relief to prevent *re-publication* of an author's defamatory, constitutionally unprotected work is subject to enforcement under Full Faith and Credit..... 1

   B. Money damages, as a disincentive to worldwide re-publication of defamatory works, are irrelevant with respect to judgement-proof Internet authors, thus increasing the importance of injunctive relief in *all* cases of Internet defamation. 3

2. Counsel for Respondent's reference to precedent of this Court, which does not apply to intentional torts, reveals the level of misunderstanding that exists with respect to this Court's holding in Calder v. Jones, and emphasizes the importance of this Court granting the Petition for Certiorari. 4

3. Since the actions of third parties can *never* be the basis for personal jurisdiction, counsel for Respondent shifts the argument to the author's *knowledge* of potential distribution, thus rejecting the reasoning upon which Griffis v. Luban rests, and further demonstrating the importance of granting the Petition for Certiorari, to eliminate continuing confusion regarding the meaning of Calder v. Jones.... 7

CONCLUSION 9

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Burger King v. Rudzewicz, 471 U.S. 462 (1985)..... 5

Calder v. Jones, 465 U.S. 783 (1984)....2, 3, 4, 5, 6, 7, 8

Keaton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984)..... 5

New York Times v. Sullivan, 376 U.S. 254 (1964)..... 3

Pittsburgh Press v. Comm'n on Human Relations,
413 U.S. 376 (1973) 2

Rush v. Savchuck, 444 U.S. 320 8

Shaffer v. Heitner, 433 U.S. 186 (1977) 5

Thompson v. Thompson, 484 U.S. 174 (1988) 1, 2

AUSTRALIAN HIGH COURT CASES

Dow Jones & Company, Inc v. Gutnick,
[2002] HCA 56 (10 Dec. 2002) 9

FEDERAL CASES

Gordy v. Daily News, LP,
95 F.3d 829 (9th Cir. 1996) 5, 6, 8

Young v. New Haven Advocate,
315 F.3d. 256 (4th Cir. 2002) 9

STATE CASES

Griffis v. Luban,
633 N.W.2d, 548 (Minn. App. 2001) 2, 4, 5

Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002) 8

Pavlovich v. Superior Court of Santa Clara County, 58 P.3d 2 (Cal. 2002) 6

STATUTES AND CONSTITUTIONAL PROVISIONS

Full Faith and Credit Clause, U.S. CONST., Art. IV, § 1 ..... 1, 2

Due Process Clause, U.S. CONST., Amend. XIV.....5, 6, 8

Uniform Enforcement of Foreign Judgments Act, Minn. Stat. § 548.27 1

1. Counsel for Respondent's argument, regarding the ability of sister states to enforce each other's judgments for injunctive relief, confirms the compelling importance of the Petition for Certiorari filed in this matter.

Counsel for Respondent questions the "true motivation" of Petitioner in seeking to enforce the injunction entered against Respondent Luban, in light of Luban's declaration of bankruptcy following the entry of the Alabama money judgement. [Response, p. 18]. In support of this argument, counsel for Respondent makes the extraordinary assertion that the Alabama injunction is unenforceable in a sister state under the Full Faith and Credit Clause and the Uniform Enforcement of Foreign Judgments Act, because it might be modified in its enforcement or because of "substantial First Amendment issues." [Response, pp. 17-18]. This argument ignores the settled precedent of this Court and appears to be intentionally misleading.[1]

A. Injunctive relief to prevent *re-publication* of an author's defamatory, constitutionally unprotected work is subject to enforcement under Full Faith and Credit.

---

[1] Counsel for Respondent also states that the Minnesota Supreme Court "vacated the Alabama judgement as well as the Ramsey County district court judgement upon which it was based." [Response, p. 11] and appears to be under the misapprehension that the Minnesota Supreme Court has the power to vacate a judgement of a sister jurisdiction. Of course, this is not possible in our Federal system. Only the Alabama courts can vacate Alabama judgements, the role of the Minnesota courts is limited to determining whether the Alabama judgement is subject to enforcement in Minnesota. *See*, Thompson v. Thompson, 484 U.S. 174 (1988).

This Court has long held that injunctive relief is appropriate under the First Amendment, and is *not* a prior restraint, when the injunction prevents *re-publication* of unprotected speech:

> "...[earlier cases] may once have stood for the proposition that any injunction against speech activity was a 'prior restraint' on speech...the special vice of a prior restraint is that communication will be suppressed...*before* an adequate determination that it is unprotected by the First Amendment," Pittsburgh Press v. Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (Rehnquist, J). (emphasis added).

In the case before the Court, the Minnesota Court of Appeals specifically found that the procedures employed in entering a default judgement by the Alabama courts provided sufficient due process to protect the interests of a defendant who intentionally failed to appear, after having received notice. Griffis v. Luban, 633 N.W.2d 548 (Minn. App. 2001). Moreover, this Court has made perfectly clear that the First Amendment, which may be relevant to substantive defamation issues, "plays no role" in the jurisdictional analysis. Calder v. Jones, at 790 (1984) (Rehnquist, J.).

Counsel for Respondent's citation of Thompson v. Thompson, 484 U.S. 174 (1988) to support his argument is inapposite, since this Court actually *upheld* the enforcement of non-monetary relief in divorce decrees issued by sister states, with this limitation:

> "... the Full Faith and Credit Clause obliges States only to accord the same force to a judgement as would be accorded by the courts of

> the State in which the judgement was entered...[B]ecause courts entering custody orders generally retain the power to modify them, courts in other states were no less entitled to change the terms of custody according to their own views of the child's best interest. Thompson at 180.

Thompson does not stand for the proposition for which counsel for Respondent cites it, and the reading suggested by counsel would prevent the operation of our Federal system.

B. Money damages, as a disincentive to worldwide re-publication of defamatory works, are irrelevant with respect to judgement-proof Internet authors, thus increasing the importance of injunctive relief in *all* cases of Internet defamation.

Under the common law, actions for defamation would lie not only against the author, but against any publisher or distributor involved in broad dissemination of the allegedly defamatory work, as is illustrated by the actions against multiple defendants in Calder v. Jones, 465 U.S. 783 (1984). Under traditional defamation rationale, money damages not only made an injured party "whole', but created a disincentive to future publication and distribution of the same defamatory work by the publisher or distributor. In the pre-Internet world, the *author* of the alleged defamation was often *not* the most important defendant to be joined in actions like Calder, or New York Times v. Sullivan, 376 U.S. 254 (1964).

Now that the Internet has made it possible for an author who is judgement proof, such as Ms. Luban, to repeatedly re-publish her attacks to worldwide audience, with merely the

touch of a computer key, money damages as a remedy no longer have any meaningful impact as a deterrent.[2] Because enforcement of injunctive relief is so important to actions arising from defamation on the Internet, the argument of counsel for Respondent adds yet another reason for this Court to address the interpretation of Calder in an Internet context, which is at the heart of this Petition.

2. Counsel for Respondent's reference to precedent of this Court, which does not apply to intentional torts, reveals the level of misunderstanding that exists with respect to this Court's holding in Calder v. Jones, and emphasizes the importance of this Court granting the Petition for Certiorari.

In so far as counsel for Respondent asserts that mere "foreseeability of harm" is insufficient to establish personal

---

[2] Counsel for Respondent makes much of the fact that Petitioner Griffis has not filed a *new* defamation action against Ms. Luban in Minnesota, Alabama, or elsewhere. In light of the fact that his client has recently declared bankruptcy [Response, p. 7], his suggestion that this Court should *reject* this Petition because, "Griffis has not brought any such suit against Luban during the 20 months since the Ramsey County District Court vacated the injunction." [Response, p. 18] merely illustrates the futility of money damages when world-wide Internet distribution is at issue in a defamation action.

Counsel for Respondent fails to mention that Petitioner Griffis *has* sought injunctive relief for statements by his client made *after* the entry of the Alabama injunction, which occurred both before and after the filing of the bankruptcy petition. The Bankruptcy Court found that seeking enforcement of injunctive relief for statements made *prior* to the filing were unenforceable "judgments", rather than equitable relief. While this is a highly questionable conclusion on its face, injunctive relief for statements made *after* the filing of the Bankruptcy are not implicated in that ruling. [Resp. App. pp. 25 *et seq.*]. Since *ongoing* enforcement of the Alabama injunction is Plaintiff's primary interest, appeal of the Bankruptcy Court finding was not in Plaintiff's interest.

jurisdiction, [Response, p. 17, citing Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985)], Petitioner and Respondent have no dispute. However, it is well established that personal jurisdiction hinges on the "... relationship among the defendant, the forum, and the litigation," Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and the contract claim in Rudzewicz provides no direction for determining personal jurisdiction in a cause of action based on an intentional tort:

> "Petitioner's analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence, Rather, their intentional, and allegedly tortious, actions were *expressly aimed* at California...they knew... the brunt of the injury would be felt by respondent in the State where she lives and works and in which the National Enquirer has its largest circulation." Calder at 790. [emphasis supplied].

The tortious act at issue in a defamation claim is the intentional creation of a defamatory written work, not the distribution of that work,[3] or the forum in which a contract can be litigated.[4]

---

[3] It is well settled that, with respect to a publisher or distributor, even a relatively minor level of distribution is sufficient to establish personal jurisdiction. *See*, Keaton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). *See also*, Gordy v. Daily News, L.P., 95 F.3d 829 (1996) in which jurisdiction over a New York newspaper was established in California although only 13 daily editions and 18 Sunday editions were sent to California because the content of a column "was of a nature that would clearly have a severe impact on [the plaintiff] as an individual. It is reasonable to expect the bulk of the harm from defamation of an individual to be felt in his domicile." Gordy at 833.

[4] Counsel for Respondent's reference to the citation of Griffis v.

Respondent's reading of Calder, would hold Internet authors to answer *only* in their home forum, irrespective of how pointedly the author, or the author's words, *intentionally* caused harm in the Petitioner's home forum, "where the brunt of the injury [to personal or professional reputation] would be felt." Calder at 790.

Petitioner's reading of Calder would hold Internet authors liable to answer either the defendant's home jurisdiction, *or* the home jurisdiction of the plaintiff [where the plaintiff "lives and works" and where the "brunt of the harm" to plaintiff's reputation will be felt]. However, personal jurisdiction should attach outside of the defendant's home forum *only* when a defendant *admits* knowledge of the forum where a plaintiff lives and works, or, in the face of a denial, when the content of a defendant's intentionally created written work reveals such knowledge.[5]

Luban in Pavlovich v. Superior Court of Santa Clara County, 58 P.3d 2 (Cal. 2002), [Response, p.16] reinforces the importance of this Court accepting this Petition. Pavlovich was a trademark action that did not involve allegedly defamatory statements, at all.

[5] Counsel for Respondent's suggests that Petitioner's reading of Calder would: "encourage...frivolous defamation actions in their home states (or countries) against their critics who live in inconveniently distant locations." [Response, p.13]. This is a mis-statement, since only defendants who actually know, or whose works reveal they should have known, the plaintiff's home forum [where the "brunt' of harm to a plaintiff's reputation would be felt] could be held to answer in the forum where a plaintiff "lives and works." *See also,* Gordy v. Daily News, L.P., 95 F.3d 829 (1996)

In the event of a vexatious choice by a plaintiff, a motion to dismiss would be sufficient for the case to be refiled in the defendant's home forum.

However, the reading of Calder suggested by counsel for Respondent, however, would insulate an author, who intentionally attacks another's reputation, from suit in any location, other than the author's home forum, no matter how directly the content of the work referred to the forum in which the "brunt" of harm to plaintiff's reputation would be felt. [*See,*

3. Since the actions of third parties can *never* be the basis for personal jurisdiction, counsel for Respondent shifts the argument to the author's *knowledge* of potential distribution by third parties, thus rejecting the reasoning upon which Griffis v. Luban rests, and further demonstrating the importance of granting the Petition for Certiorari, to eliminate continuing confusion regarding the meaning of Calder v. Jones .

The Petition for Certiorari describes how the Minnesota court's reasoning, requiring a plaintiff to allege and prove "distribution in the forum" by third parties both violates Due Process and would require a reversal of the outcome if Calder, itself. [Petitioner, pp. 20-23]. In response, counsel for Respondent concedes, as he must, that in Calder it must have been defendant's *knowledge* that "California was the focal point of both the story and the harm suffered," which was the basis for personal jurisdiction [Response, p. 12] , NOT a showing of physical distribution by third parties, as required by the Minnesota Supreme Court. [*See*, Petition, pp. 17-24]. Thus, counsel for Respondent shifts the argument by asserting that a defendant's knowledge of the *extent of his employer's distribution network in California*, [Response, p.12], rather than defendant's knowledge that California was the *"focal point of the*

Petition, pp. 15-17].

This reading would permit an intentional tortfeasor to avoid having to defend in the forum in which they intentional chose to cause harm. This would turn the due process shield, which is necessary for innocent defendants, into a shield for intentional wrong doers to attack the reputations of others and impose their own choice of the forum, as well.

story and the harm suffered," which led this Court to find personal jurisdiction in Calder.

Of course, the Due Process Clause prevents consideration of the acts of third parties, in determining personal jurisdiction, *See*, Rush v. Savchuck, 444 U.S. 320, 322, cited at Calder, 465 U.S. at 790. Counsel for Respondent argues that personal jurisdiction in Calder must rest on the defendant author's ability to predict *future conduct* of third parties, based on their past conduct.

When the author completed the offending work in Calder, he might have had some general knowledge of past distribution practices of the *Enquirer*. However, that author could not have known whether that particular story would be accepted for publication, much less whether it would be distributed, or where it would be distributed, by the employer.

Imputed "knowledge" of possible distribution in a forum by third parties that may, *or may not*, ever occur can hardly be a basis to deny, or to uphold, personal jurisdiction over a defendant. Rather, in Calder personal jurisdiction was found to exist because the *content* of the written work revealed, over his objection, that the author: [a] "targeted" California by attacking Plaintiff's reputation, knowing the "brunt of the injury" would occur where "she lives and works;" [b] "aimed" at California by specifically mentioning Plaintiff's supposedly irresponsible activities in her home state; and [c] made California the "focus of the activities...out of which the suit arises." *See also*, Gordy v. Daily News, L.P. 95 F.3d 829 (9th Cir. 1996).

The apparent misunderstanding of Calder revealed in the holding of the Minnesota Supreme Court considering the "acts of third parties", is compounded in the Response, which advocates a rule based on "knowledge of possible future acts of third parties." The Response makes much clearer than

Petitioner's own arguments ever could, that this Court must soon clarify the application of the Calder v. Jones "effects" test to Internet authors when defamation is at issue.

CONCLUSION

Counsel for Respondent asserts that it the defendant author's knowledge of his employer's *past distribution practices* is the factor upon which personal jurisdiction rests in Calder, [Response, p. 12]. This is actually a rejection of the basis for the holding of the Minnesota Supreme Court from which this Petition is brought, [*see*, Petition, pp. 17-23] and is a contradiction which makes clear that this Court must soon clarify the application of Calder to Internet authors.

Because Internet publication has put a worldwide audience within the reach of any author with access to a computer terminal, this question becomes even more compelling. The increased significance of authors as the sole agents of the worldwide distribution of their work, together with the apparent widespread confusion regarding the meaning of this Court's holding in Calder v. Jones, makes clear that this question cannot wait long for resolution.

This Petition presents the Court with a set of facts that focus clearly on the application of Calder to an internet author and presents excellent opportunity to clarify issues, which are important to all users of the Internet, to the lower courts in the United States[6], and to courts worldwide.[7]

---

[6] *See*, Young v. New Haven Advocate, 315 F.3d. 256 (4th Cir. 2002), a case involving personal jurisdiction over a publisher, which relied on Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002), even though personal jurisdiction over the publisher was not at issue in Calder, nor Griffis.

[7] *See*, Dow Jones & Company, Inc v. Gutnick, [2002] HCA 56 (10 Dec. 2002). The High Court of Australia adopts a rule, much like that advanced by Petitioner, that a plaintiff harmed by Internet postings, whose

Respectfully submitted.

Prof. Peter Erlinder
Counsel of Record
c/o William Mitchell College of Law
875 Summit Ave.
St. Paul, MN 55105
(651) 290-6384

Ralph Overholt
Attorney at Law
7400 Lyndale Ave. Suite 180
Minneapolis, MN 55423
(612) 869-8829

---

content intentionally "focused" on plaintiff's financial standing in Australia, could be sued where defendant knew the brunt of the harm to plaintiff's reputation and business would be felt.